



**Wekesa (Suing as Legal Representative and Administrator of the Estate of Erick Wekesa Simiyu - Deceased) & another v Masinde (Civil Appeal E003 of 2022) [2024] KEHC 8764 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8764 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E003 OF 2022**

**DK KEMEL, J**

**JULY 19, 2024**

**BETWEEN**

**LINDA NELIMA WEKESA (SUING AS LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF ERICK WEKESA SIMIYU - DECEASED) ..... 1<sup>ST</sup> APPELLANT**

**JOHN MILIMO BIFWOLI (SUING AS LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF ERICK WEKESA SIMIYU - DECEASED) ..... 2<sup>ND</sup> APPELLANT**

**AND**

**OSCARS MASINDE ..... RESPONDENT**

*(Being an Appeal against the Judgement and Decree of the Principal Magistrate at Webuye (the Honourable M. Munyekenye) delivered on 21st December, 2021)*

**JUDGMENT**

1. The appeal before me is against the award of a multiplier ratio of  $\frac{1}{2}$  by the trial Court with liability at 50% apportioned to the Appellants. The judgment was delivered on 21<sup>st</sup> December 2021. Aggrieved by the judgment, the Appellants filed a memorandum of appeal on the 17<sup>th</sup> January 2022. The appeal is mainly on the trial court's finding on liability and award on multiplier ratio. The grounds of appeal are: -
  - a. That the learned magistrate erred in law and in fact in awarding liability at 50% as against the Plaintiff when no evidence was tendered on any contributory negligence on the part of the deceased.



- b. That the learned magistrate erred in law and in fact in condemning the Appellants into 50% liability for the accident.
  - c. That the learned magistrate erred in law and in fact in awarding a multiplier ratio of ½ to the deceased who was survived with a widow, the 1<sup>st</sup> Appellant, and a child.
  - d. That the learned magistrate after considering all the evidence and submissions arrived at a wrong decision thus there was a miscarriage of justice.
  - e. That the learned magistrate erred in law and in fact when she failed to consider the submissions of the Appellants.
2. The Appellants prayed for this appeal to be allowed and the judgement of the trial court on liability; multiplier ratio of ½ be set aside and/or vacated; that this Honourable Court do proceed and make an award on liability and on multiplier ratio and that the Appellants be awarded costs of this appeal.
  3. This being the first appeal, I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that i did not hear and see the witnesses who testified. See *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123.

### **Background**

4. The Plaintiffs/Appellants suing as legal representatives and Administrators of the estate of Erick Wekesa Simiyu, filed suit against the Defendant/Respondent vide a plaint dated 14<sup>th</sup> December 2017, seeking for general and special damages under the *Law Reform Act* and *Fatal Accidents Act* for serious injuries sustained in a road accident which occurred on the 26<sup>th</sup> June, 2016 along Eldoret-Bungoma road at Wanainchi area. The deceased was lawfully riding Motor Cycle registration number KMDU 081 M TVs Star and when the Defendant/Respondent's motor vehicle registration number KBT 904 G (Toyota Premio) was so negligently, carelessly and/or recklessly driven by him or his authorized driver/agent/servant and/or employee caused the same to violently lose control and knock down the deceased as a result of which he sustained severe injuries and succumbed to the said injuries while receiving treatment at Webuye District Hospital.
5. The Defendant/Respondent entered appearance and filed his defence dated 8<sup>th</sup> March 2018, wherein he attributed the death of the deceased to his own negligence while he was riding his motor cycle registration number KDMU 081M.
6. The matter was set down for hearing on 30<sup>th</sup> October 2019.

### **The Evidence**

7. PW1 was Linda Nelima Wekesa who testified that she is the widow of the deceased herein and that on 26<sup>th</sup> June 2016, the deceased was involved in a road traffic accident which she did not witness. She proceeded to adopt her recorded witness statement dated 14<sup>th</sup> December 2017 as her evidence-in-chief. She told the Court that the moment she received information of the accident she proceeded to the scene and found the deceased had already been moved to Webuye District Hospital for treatment. On arriving at the hospital, she was informed of his demise. She produced in Court the death certificate of the deceased indicating that he was 33 years old as well as the grant of letters of administration Ad Litem for the estate of the deceased. She testified that she incurred expenses during the funeral of the deceased and placed before the Court the respective receipts to support her claim.

On cross-examination, she told the Court that she was the wife of the deceased but did not have a marriage certificate as the elders only met prior to them starting to live together. She testified that she



bore the deceased one child but failed to avail any birth certificate. She alleged that the deceased was also employed by someone else in addition to being a motor cycle rider and that he earned Kshs. 500/= . She did not avail any letter from his employer to ascertain the same. She produced a letter from the chief to show that the 2<sup>nd</sup> Appellant was her father-in-law. She testified that the father and brother of the deceased also relied on him for financial support as he was the sole bread winner.

8. PW2 was No. 58555 CPL James Kebicha who testified that he is based at Webuye Police Station Traffic Section and that he produced the Police Abstract for the road traffic accident involving the deceased herein. He told the Court that he was not the investigating officer on the accident and that he could not testify to the circumstances that led to the accident. He told the Court that the investigating officer is one Kulecho but who had been transferred.

On cross-examination, he told the Court that was not the investigating officer on the accident and that he could not testify to the circumstances that led to the accident. He testified that from the Police Abstract, it is indicated that the motor cycle was not insured and that the driver of the motor vehicle was not indicated. He further testified that he is not aware on how the investigating officer established that the owner was the Defendant/Respondent.

On re-examination, he reiterated that at time the Police Abstract was issued, investigations were still ongoing.

9. PW3 was Edwin Simiyu Munialo who testified that on 26<sup>th</sup> June 2016, he was a pillion passenger on the deceased's motor cycle from Webuye heading home at Generation but they never arrived. He adopted his recorded statement dated 27<sup>th</sup> May 2019 as his evidence-in-chief. According to him, the Defendant/Respondent's motor vehicle lost control and left his lane entering onto theirs. They were heading towards Eldoret general direction while the motor vehicle was heading away from Eldoret. They were knocked on the left side as one faces Eldoret.

On cross-examination, he told the Court that he does not know the driver of the motor vehicle and that he was not the rider of the motor cycle. He further testified that he was not aware whether the owner of the motor vehicle was the driver and that he never testified in any traffic case. He told the Court that he was a pillion passenger and that the accident was so abrupt that the next thing they saw the motor vehicle lost control and came towards them. He testified that the motor cycle rider was not over speeding and that he did witness the accident.

On re-examination, he told the Court that the rider could not swerve off as the motor vehicle was being driven at a high speed.

10. At this juncture the Appellants closed their case.

11. The Respondent testified as DW1. He adopted his recorded witness statement dated 20<sup>th</sup> May 2019 as his evidence-in-chief. According to him, the motor vehicle KBT 904G was not at the scene of the accident and that he was not the one driving the same. He told the Court that he did not know who was driving the motor vehicle as he had gone back to the car wash where he left it and did not find the same. He proceeded to report the same to the police but before he completed with his report, the police received information of an accident and when the details of the information were shared he learnt it was his vehicle.

On cross-examination, he told the Court that the motor vehicle that caused the accident was his and that he only learnt of the same when he was at the police station making a report. He told the Court that he did not have an OB indicating that his motor vehicle was missing. He insisted that he was not present at the accident.



- On re-examination, he told the Court that he was in the process of making his report of his missing motor vehicle when a report of an accident was made. The police instructed him to wait.
12. The Appellant proceeded to close his case. Thereafter counsels for both parties filed their written submission and authorities for the trial's court consideration.
  13. The trial Court decided that the Appellants had sufficiently proved that the accident had indeed occurred as pleaded in the Plaint. The trial Court was further persuaded by the Appellant's witness (PW3) who was an eye witness and pillion passenger on the deceased's motor cycle. The court took note of the fact that the Respondent admitted that the motor vehicle did indeed belong to him.
  14. On the issue of liability, the trial Court proceeded to apportion blame equally between the parties. According to the trial court, the police file, sketch plans or photographs were not availed before the Court to guide it in reconstructing the scene of the accident. The learned magistrate further held that since the accident was still pending investigations as per the Police Abstract, no one was charged for the accident. She held that both parties contributed to the accident.
  15. On quantum, the trial Court pointed out that it had perused the authorities relied on by the Plaintiffs and proceeded to award a sum of Kshs. 30,000/= under pain and suffering; a sum of Kshs. 100,000/= under loss of expectation of life; a sum of Kshs. 1,064,760/= under loss of dependency and a sum of Kshs. 88,000/= under special damages. The court delivered judgment in favor of the Appellants at 50% each on liability, damages at Kshs. 1, 282,760/= as well as 50% of the costs and interests at Court rates. On special damages interest was to run from the date of filing the suit whilst on general damages from the date of judgment.
  16. The appeal was canvassed by way of written submissions. Both parties filed and exchanged their respective submissions.
  17. Vide written submissions dated 8<sup>th</sup> November 2023, the Respondent opposed the Appellants memorandum of appeal and proceeded to file his respective cross-appeal. He argued that on the issue of liability the trial Court was right as no rebuttal evidence on how the accident occurred was tendered by the Appellants. He argued that the Appellants failed to discharge their duty under section 107 and 108 of the *Evidence Act* thus prompting the trial Court to hold that both parties failed to take proper care of their respective chattels leading to the accident.
  18. On the multiplier ratio of  $\frac{1}{3}$ , he argued that it was upon the Appellants to prove their case as pleaded. He argued in the case like this on appeal where the deceased lacked any source of income the trial Magistrate ought not to have relied on the minimum wage's regulations relevant at the time of the deceased's demise as no form of the deceased's employment was proved by the Appellants. He argued that the appropriate approach would have been a lump sum award to avoid speculations.
  19. The Appellants submitted that they availed an eye witness who testified to how the accident occurred and blamed the driver of the motor vehicle KBT 908 G and wanted the Court to hold the owner of the motor vehicle vicariously liable. Counsel argued that the failure to conclude investigations by the investigating officer did not automatically mean that the Appellant contributed to the accident that occurred. Counsel urged this Court to hold the Respondent vicariously liable for the actions of the driver of his motor vehicle as he never pursued the owner of the car wash to know who had taken his car and caused the accident.
  20. On the multiplier ratio, Counsel submitted that the 1<sup>st</sup> Appellant is the widow of the deceased herein and that she bore him a daughter. She testified in Court that she availed the letter from the chief to prove that she was known as the daughter-in-law of the 2<sup>nd</sup> Appellant herein. She testified that she



married the deceased under customary law and that she bore him a child but she did not have the birth certificate. Counsel urged this Court to find that there is circumstantial evidence and on a balance of probability the deceased was married and that he has a child. He urged this Court to replace the multiplier ratio of  $\frac{1}{3}$  with  $\frac{2}{3}$ .

21. It is now settled law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions. See Court of Appeal for East Africa in *Peters –vs- Sunday Post Limited* [1958] EA 424. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:

I. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

II. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

III. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

22. Before I venture into the substantive analysis of this appeal, it is imperative for this Court to note that the Respondent filed his written submissions on this appeal fronting his cross-appeal. Notably section 79G of the *Civil Procedure Act* Cap 21 (Laws of Kenya) provides that:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.”

23. Order 42 Rule 32 of the Civil Procedure Rules states as follows:

“The Court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal (emphasis Court).”

24. In the case of *Kenya Power & Lighting Co Ltd v Peter Langi Mwasi* [2018] eKLR which this Court fully associated itself with, it was held that whereas the timelines for filing of cross appeals was not provided for in the Civil Procedure Rules, the same ought to be filed without any delay. In the mind of this Court, the cross appeal ought to be filed at least before directions under Order 42 Rule 11 of the Civil Procedure Rules have been given in the main appeal.

25. From the foregoing, it is certain that the Respondents Cross-Appeal is not properly instituted before this Court as the same was filed way beyond the allowed statutory period of appeal and that no leave was sought from this Court to allow the same to be filed out of time. Secondly, a Cross-Appeal just like any other appeal ought to be prepared in the requisite statutory procedure and not fixed under



- written submissions with declarations that a party is filing his Cross-Appeal. This simply means that this Court will not venture into the substance of the Cross-Appeal as expected by the Respondent.
26. The key issues for determination are on liability and the award of  $\frac{1}{3}$  multiplier ratio. On the issue of liability, the law is clear that he who alleges must prove. The term burden of proof draws from the Latin phrase “Onus Probandi” and when we talk of burden we sometimes talk of onus.
  27. Burden of proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term ‘burden of proof’ has two distinct meanings:
    - i. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one’s way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to prove their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.
    - ii. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.
  28. Section 107 of [Evidence Act](#) defines burden of proof as– of essence the burden of proof is proving the matter in court. Subsection (2) refers to the legal burden of proof.
  29. Section 109 of the [Evidence Act](#) exemplifies the rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.
  30. A cursory look at the record of appeal reveals that indeed on a balance of probabilities there was sufficient evidence to prove, at least on a balance of probability, that indeed a road traffic accident involving the deceased’s motor cycle and the Respondent’s motor vehicle occurred along Eldoret-Bungoma road at Wanainchi area on the material date. The Police Abstract and evidence of DW1 also conclusively proved ownership of the particular motor vehicle and hence the issue of ownership was not a central issue before the trial Court. There is no liability without fault (see *Kiema Mutuku v Kenya Cargo Hauling Services Ltd 1991* cited with approval in *East Produce (K) Limited v Christopher Astiado Osiro [2006] eKLR*) and so for the Appellants to succeed they were required to prove on a balance of probabilities that the accident was caused by negligence on the part of the Respondent.
  31. PW3 testified that he witnessed the accident as he was the pillion passenger on board motor cycle KMDU 081M. He blamed the collision on the driver of the Respondent’s vehicle saying that he drove into the path of the deceased’s motor cycle. The Respondent on the other hand was more focused on whether PW3 knew that he was not the driver of the motor vehicle and that if he saw the person who was driving the same at the time of the accident. The Respondent alleged that he had left his motor vehicle at a certain car wash and when he went to pick it up he found it missing. He later went to report the theft at the Police station in Webuye where in course of his report a report was made of an accident and that’s when he learnt that motor vehicle involved in the accident was his. The Respondent never availed any witness like the police officer who begun to record his statement of OB indicating that he



indeed was at the station making a report. Be that as it may, it is my finding that PW3's evidence that he witnessed the accident is believable. I am therefore persuaded that the PW3 gave a credible account of how the accident occurred and I find him to be a reliable and trustworthy witness. Therefore, this appeal succeeds on liability as I find the Respondent to be 100% liable for the accident that killed the deceased herein on 26<sup>th</sup> June 2016.

32. On the issue of the award of  $\frac{1}{3}$  multiplier ratio, I must start by pointing out that it is settled law that the award of damages is always at the discretion of the trial Court. An appellate Court should not interfere with the trial Court's award on damages unless it is satisfied that in awarding the damages, the trial Court misapprehended the facts or applied the wrong legal principles or that the award was either too high or too low as to lead to an inference that it was an erroneous estimate of the loss or damage suffered. See: *Mariga V Masila*, [1984] KLR 251.
33. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated:

“[I]t is firmly established that this court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the Plaintiff is entitled.”
34. From the judgment of the trial Court, the two awards under the *Law Reform Act* and the Fatal Accidents were considered in close proximity as to indicate that the Court did have in mind and take into account its award for non-pecuniary damages for loss of expectation of life and pain and suffering when considering the damages under the *Fatal Accidents Act*.
35. The Appellants have taken issue with the trial Court's calculation of dependency to be precise the use of the  $\frac{1}{3}$  multiplier ratio. The Appellants invited this Court to re-evaluate this by replacing the same with a multiplier ratio of  $\frac{2}{3}$  as the deceased was survived by a widow and child.
36. To put it simply, the formula for dependency, therefore, is the multiplicand, that is the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased's income utilized on his dependants.
37. The pertinent evidence adduced before the trial Court shows that the deceased was married and was survived by one child at the time of his death. Dependency ratio is indeed a matter of fact which has to be established by way of evidence. The chief's letter was sufficient to prove the existence of the 1<sup>st</sup> Appellant as the deceased's widow and his child. I find the presence of the child, a stay at home wife and black tax was the impetus for the deceased to keep on working so as to provide for them. That being the position, I find that the ratio of  $\frac{1}{3}$  adopted by the trial Court was rather low and that a ratio of  $\frac{2}{3}$  ought to have been factored as there were his widow, child, father and brothers who depended on the deceased. In the present case, the dependants of the deceased are entitled to  $\frac{2}{3}$  of the deceased's income for their upkeep and survival. In the end, the award on loss of dependency will be worked out as Kshs.  $8,873 \times 12 \times 27 \times \frac{2}{3} = 1,916,568/=$ .
38. The other aspects of quantum will remain intact as it is not challenged.



39. In view of the foregoing observations, I find the Appellants' appeal has merit. The same is allowed. The trial Court's finding on liability as well as the award on multiplier ratio is hereby set aside and substituted with the following:

- i. Liability against the Respondent.....100%
- ii. Pain and suffering..... Kshs 30,000/
- iii. Loss of expectation of life.....Kshs 100,000/
- iv. Loss of dependency  
(8, 873×12×27×%) .....Kshs. 1, 916, 568/=
- v. Special damages..... Kshs. 88,000=
- vi. NET AWARD.....Kshs. 2, 134, 568/=
- vii. Interest at Court rates-special damages interest from date of filing the suit while general damages shall attract interest from the date of the judgement of the lower Court.

Each party shall bear their own costs of this appeal while the Appellants shall have full costs in the lower court.

**Dated and delivered at Bungoma this. 19th day**

**Of July 2024**

**D. Kemei**

**Judge**

**In the presence of:**

**Miruka for Mwebi for Appellants**

**No appearance Mose & Mose for Respondents**

**Kizito Court Assistant**

